IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	No. 3:06-cr-0573-JAJ
vs.	
MICAIAH REY,	ORDER
Defendant.	

On February 15, 2007, a superseding indictment containing five counts was filed against Micaiah Rey and Geno Webb. Count 1 charged Rey and Webb with conspiracy to distribute at least 50 grams of cocaine base from April 23, 2005, to November 16, 2006, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A); Count 2 charged Rey and Webb with distribution of at least 5 grams of cocaine base on October 20, 2005, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); Count 3 charged Rey and Webb with distribution of at least 5 grams of cocaine base on March 23, 2006, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); Count 4 charged Rey with distribution of cocaine base on November 13, 2006, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(c); Count 5 charged Rey with distribution of cocaine base on November 16, 2006, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(c).

Rey and Webb were tried in a joint jury trial that began on April 30, 2007. On May 3, 2007, the jury found Rey guilty on Counts 1, 2, 3, 4, and 5 of the superseding indictment. In regard to Count 1, the jury found that the offense involved more than 5 grams of cocaine base, but less than 50 grams. On that same date, the jury also found Webb guilty of Counts 1, 2, and 3 of the superseding indictment.

On January 17, 2008, a sentencing proceeding regarding Rey and Webb took place

before this Court. Prior to the proceeding, the government, Rey, and Webb filed sentencing memoranda with this Court. Rey and Webb each filed objections to the Pre-Sentence Reports. The Court sentenced Webb to the custody of the Bureau of Prisons for a term of 130 months, to run concurrently, on Counts 1, 2, and 3, of the superseding indictment, and a term of supervised release of five years on Counts 1, 2, and 3 of the superseding indictment. The Court reserved ruling on issues of law presented with respect to defendant Rey and continued Rey's sentencing proceeding to a later date.

The principal question before this Court at the January 17, 2008, proceeding concerned the mandatory minimum sentence that Rey was required to serve for his conviction on Count 1 under 21 U.S.C. § 841. The government argued that the Rey is subject to a 20-year mandatory minimum under § 841(b)(1)(A)(iii) because Rey has a prior conviction that qualifies as a "felony drug offense" under 21 U.S.C. § 802(44), and the court determined, for sentencing guideline purposes, that the offense involved 50 grams or more of a mixture or substance containing cocaine base. Rey argued that he was subject to a 5-year mandatory minimum under § 841(b)(1)(B)(iii) because his prior conviction did not qualify as a felony drug offense and the jury found, as a part of its verdict, that Rey's offense involved between 5 and 50 grams of a mixture or substance containing cocaine base. This Court finds that Rey is subject to the 20-year mandatory minimum under § 841(b)(1)(A)(iii) because his prior conviction qualifies as a "felony drug offense" and the instant offense involved 50 grams or more of a mixture or substance containing cocaine base.

I. Rey's Prior Conviction is a "Felony Drug Offense" Under 21 U.S.C. § 802(44)

Under 21 U.S.C. § 802(44), a "felony drug offense" is defined as an offense that is punishable by imprisonment for more than one year under any federal, state, or foreign law that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic

steroids, or depressant or stimulant substances. Prior to trial, the government filed on March 7, 2007, enhancement information to establish a prior conviction for Rey. (Clerk's No. 46). The enhancement information showed that on August 4, 2004, Rey was convicted in a Cook County, Illinois, of possession of a controlled substance, a Class 4 felony under Illinois state law. (Clerk's No. 46). Rey was sentenced to a term of one year of imprisonment and fined \$519 for the conviction. Under Illinois State Code Chapter 730-5/5-8-1(7), a class 4 felony is punishable by a sentence of not less than one year and not more than three years.

The Eighth Circuit Court of Appeals has held that a controlled substance possession felony qualifies as a "felony drug offense" under 21 U.S.C. § 802(44). See United States v. Maynie, 257 F.3d 908, 919 n.5 (8th Cir. 2001). Because Rey's 2004 conviction was punishable by a sentence of not less than one year and not more than years in prison, his conviction qualifies as a "felony drug offense" under 21 U.S.C. § 802(44). Rey's prior conviction for a "felony drug offense" causes Rey to come within the purview of § 841(b)(1)(B)(iii), which provides for increased sentencing ranges for convicted defendants who have one or more prior convictions for "felony drug offenses." See United States v. Thomas, 398 F.3d 1058, 1043-1064 (8th Cir. 2005) (citing Almendarez-Torres v. <u>United States</u>, 523 U.S. 224 (1998) (finding that mandatory life sentence under U.S.C. 841(b)(1)(A) for two prior convictions for "felony drug offenses" is not a constitutional violation of the Sixth Amendment right to jury trial because a prior felony conviction "is a sentencing factor and not a separate offense and it is therefore does not need to be pled in the indictment or put to a jury.") Under § 841(b)(1)(B)(iii), Rey's statutory sentencing range is a ten-year mandatory minimum sentence and a maximum sentence of life imprisonment.

II. Drug Quantity Determination

As a part of his conviction for Count 1, the jury found that Rey's offense involved between 5 and 50 grams of a mixture or substance containing cocaine base. On the verdict form, the jury had the option to find that Rey's offense involved more than 50 grams of a mixture or substance containing cocaine, but the jury declined to do so. For this reason, the defendant argues that the Court cannot find that Rey's offense involved a larger quantity of cocaine than that contained in the jury determination. If the Court finds that Rey's offense involved more than 50 grams of a mixture or substance containing cocaine, then he will be subject to a 20-year mandatory minimum, instead of a ten-year mandatory minimum. However, regardless of whether he is responsible for more than 5 grams or more than 50 grams, the statutory maximum sentence in either case is life imprisonment.

Rey argues that the Court cannot find Rey's offense involved a larger quantity of cocaine than that contained in the jury determination because such a finding by the Court would violate his protections under Apprendi v. New Jersey, 530 U.S. 466 (2000). The rule of Apprendi states that "...any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 at 490. The government argues that the Court can lawfully find that Rey's offense involved more than 50 grams of a substance or mixture containing cocaine because the finding will only increase the statutory mandatory minimum sentence from 10 years to 20 years, and have no effect on the statutory maximum sentence.

The Eighth Circuit Court of Appeals has repeatedly held that a district court can find a drug quantity, for purposes of sentencing, that is different than the drug quantity found by the jury so long as the sentence imposed on the defendant for the judge-found drug quantity does not exceed the statutory maximum sentence for the drug quantity that the jury found as a part of its verdict. See United States v. Aguayo-Delgado, 220 F.3d 926, 933-34 (8th Cir. 2000) (Eighth Circuit Court of Appeals affirmed sentence of

defendant when jury did not make finding regarding drug quantity, district court found drug quantity at sentencing hearing, and district court's finding of drug quantity provided for increase in mandatory minimum under applicable statute); United States v. Chavez; 230 F.3d 1089 at 1090-91 (8th Cir. 2000) (Eighth Circuit Court of Appeals affirmed sentence of defendant when jury verdict found drug quantity of at least 1700 grams of methamphetamine and district court found drug quantity of 81 kilograms); United States v. McIntosh; 236 F.3d 968, 975 (8th Cir. 2001) (Eighth Circuit Court of Appeals affirmed sentence when defendant entered a guilty plea to a drug offense and district court found at sentencing that defendant was subject to statutory sentence enhancement for death that resulted from use of such substance). In the case at bar, Rey's statutory sentence range pursuant to the jury verdict, is a mandatory minimum of ten years and a maximum term of life imprisonment pursuant to § 841(b)(1)(B)(iii) because of his prior drug felony. A finding that Rey's offense involved more than 50 grams of cocaine base will increase Rey's mandatory minimum from 10 to 20 years. 21 U.S.C. §§ 841(b)(1)(B)(iii), 841(b)(1)(A)(iii). Such a finding would not, however, increase defendant's maximum sentence, which is a life sentence under either statutory provision. 21 U.S.C. §§ 841(b)(1)(B)(iii), 841(b)(1)(A)(iii). Accordingly, this Court finds that the Apprendi rule will not be violated by this Court's finding of a drug quantity greater than that contained in the jury verdict.

The government has to prove drug quantities by a preponderance of the evidence. Aguayo-Delgado, 220 F.3d at 929-30. Testimony and physical exhibits from the trial amply demonstrate that Rey's offense involved more than 50 grams of a mixture or substance containing cocaine base. Thus, this Court concludes that the government has met its evidentiary burden with regard to drug quantity, and finds that Rey's offense involved more than 50 grams of a mixture or substance containing cocaine base. As a result, Rey is subject to a mandatory minimum of 20 years pursuant to § 841(b)(1)(A)(iii).

Upon the foregoing,

IT IS ORDERED

That the defendant's mandatory minimum sentence is twenty years incarceration.

DATED this 28th day of January, 2008.

SOUTHERN DISTRICT OF IOWA